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In The

Supreme Court of the United States

October Term, 1997

ARTHUR CALDERON, WARDEN, CALIFORNIA STATE PRISON AT SAN QUENTIN,

Petitioner,

v.

THOMAS M. THOMPSON,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR RESPONDENT

QUIN DENVIR
Federal Defender
801 "K" Street, 10th Floor
Sacramento, California 95814
(916) 498-5700

ANDREW S. LOVE
LAW OFFICES OF COFFIN & LOVE
301 Pennsylvania Avenue
San Francisco, California 94107
(415) 920-3705

GREGORY A. LONG
(Counsel of Record)
SHEPPARD, MULLIN, RICHTER & HAMPTON
333 South Hope Street, 48th Floor
Los Angeles, California 90071
(213) 620-1780

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Did the limitations on successive petitions put in place by the Antiterrorism and Effective Death Penalty Act, and in particular by 28 U.S.C. § 2244(b)(1), remove the longstanding jurisdiction of a court of appeals to recall its mandate on its own motion in the appeal of a petitioner's first *habeas corpus* petition?

2. Did the court of appeals abuse its discretion when it *sua sponte* recalled its mandate to protect the integrity of its processes and to prevent a possible miscarriage of justice?

3. Did the *en banc* court of appeals correctly conclude that the three-judge panel committed errors of law that would result in a manifest injustice sufficient to justify recalling the mandate?

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STATEMENT OF THE CASE

Thomas Martin Thompson and David Leitch were charged with the rape and murder of Ginger Fleischli. The cases of the defendants were severed, and Mr. Thompson was tried first. On November 4, 1983, Mr. Thompson was convicted of rape and first degree murder; and a rape special circumstance finding, which made him eligible for the death penalty, was found true. On August 17, 1984, Mr. Thompson was sentenced to death. Mr. Leitch, tried before the same judge and by the same prosecutor but to a different jury, was found guilty of second degree murder and sentenced to 15 years to life. J.A. 67 n.33.

The California Supreme Court, in a 5-2 decision, affirmed Mr. Thompson's convictions and sentence. *People v. Thompson*, 45 Cal.3d 86, 246 Cal.Rptr. 245, 753 P.2d 37 (1988). On November 14, 1988, this Court denied Mr. Thompson's petition for a writ of *certiorari*. *Thompson v. California*, 488 U.S. 960 (1988).

The California Supreme Court denied Mr. Thompson's petition for a writ of *habeas corpus* and, on January 19, 1990, Mr. Thompson petitioned for a writ of *habeas corpus* in the United States District Court for the Central District of California, alleging *inter alia* that his trial counsel had defended him incompetently. In November 1993, the district court held an evidentiary hearing, the first and only such hearing in this case. On March 29, 1995, the district court found that trial counsel had rendered constitutionally ineffective assistance; and it entered its judgment invalidating the rape conviction and rape special circumstance finding, and therefore vacating

the death sentence, but denying relief as to the murder conviction. J.A. 4-105.[1]

On June 19, 1996, a panel of the court of appeals reversed the district court's partial grant of *habeas* relief and ordered that all relief be denied. *Thompson v. Calderon*, 86 F.3d 1509 (9th Cir. 1996); J.A. 106-135. Without an inquiry into the adequacy of trial counsel's performance, the panel rejected the district court's findings that trial counsel's failures were prejudicial. *Id.*

Mr. Thompson filed a timely petition for rehearing and suggestion for rehearing *en banc*. On March 6, 1997, the panel's opinion was amended without change in the outcome, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The panel's order stated that no judge in active service had requested a vote on an *en banc* rehearing. *Thompson v. Calderon*, 109 F.3d 1358 (9th Cir. 1997); J.A. 136. The reason that no such vote took place has since been disclosed to be a series of communication failures inside the court, with two judges failing to meet the deadline for requesting a vote and the panel refusing to extend that deadline to permit an out-of-time request. J.A. 214-215, 241, 243.

On April 21, 1997, Mr. Thompson filed a petition for a writ of *certiorari* in this Court. On June 2, 1997, the Court denied the petition. *Thompson v. Calderon*, 117 S.Ct. 2426 (1997).

On June 11, 1997, the court of appeals issued its mandate. J.A. 212. A *sua sponte* request to consider *en banc*

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[1] The district court rejected Mr. Thompson's claim that the prosecutor's use of factually and legally inconsistent theories at the separate trials of Mr. Thompson and Mr. Leitch violated the constitutional guarantee of due process. J.A. 67-73.

whether to recall the mandate was made shortly thereafter. J.A. 215. Through a consultative process, the court of appeals decided to postpone action on whether *sua sponte* to recall the mandate until Mr. Thompson had concluded his state court *habeas* proceedings[2] and had filed a further request for review in the court of appeals. J.A. 215.

On July 23, 1997, Mr. Thompson filed a motion in the court of appeals to recall the mandate in his first *habeas corpus* appeal. This motion was denied by the panel on July 28, 1997. J.A.190-193. Mr. Thompson then filed a petition for rehearing and suggestion for rehearing *en banc*. On July 30, 1997, the court of appeals voted to take the case *en banc* to determine " . . . whether to recall the mandate to consider whether the panel decision would result in a fundamental miscarriage of justice." J.A. 194. The *en banc* court heard oral argument on August 1, 1997.[3]

On August 3, 1997, the *en banc* court issued a decision recalling the mandate on its own motion because "our normal *en banc* process did not function in the intended manner" and because "in reversing the district court, the panel appears to have made fundamental errors of law that, if not corrected, would lead to a miscarriage of

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[2] Mr. Thompson filed a state *habeas corpus* petition based on newly discovered evidence in the California Supreme Court on July 3, 1997, which was denied on July 16, 1997. On July 23, 1997, Mr. Thompson filed a Fed.R.Civ.P. 60(b) motion in district court, which sought relief from judgment on his first federal *habeas* petition and to amend the petition with newly exhausted claims. The district court denied the motion on July 25, 1997. An appeal from that denial was dismissed as moot by the *en banc* court. J.A. 212.

[3] Under Ninth Circuit Rule 35-3, the *en banc* court consisted of the Chief Judge and ten additional judges drawn by lot from the active judges of the court.

justice." J.A. 214. The court then vacated the panel opinion, reviewed the case on the merits, and, by a 7-4 vote, found that trial counsel's ineffectiveness was prejudicial as to the rape conviction and special circumstance finding, set aside those findings, and remanded the case to the district court for a determination of the effect of the invalidation of the rape conviction on the murder conviction. J.A. 227, 239. Seven judges of the *en banc* panel further found that the prosecutor's use of fundamentally inconsistent theories at the separate trials of Mr. Thompson and his codefendant violated due process. J.A. 248-49. Five of these judges found this due process violation prejudicial, and the other two (who controlled the judgment on this point) voted to remand to the district court for a determination of prejudice. *Id.*

On August 4, 1997, an active judge of the court of appeals called for a vote on a motion to withdraw Mr. Thompson's appeal from the *en banc* panel for rehearing by the full court. *See* Ninth Circuit Rule 35-3. The motion failed to receive the support of a majority of the active judges of the court and was denied. J.A. 277.

On August 4, 1997, the State filed a petition for a writ of *mandamus* in this Court and requested expedited consideration. The Court granted expedited consideration, denied the *mandamus* petition, but, treating the papers as a petition for a writ of *certiorari*, granted certiorari as to Questions 1 and 2 presented by the petition. On August 26, 1997, the Court directed briefing on a third question.

STATEMENT OF FACTS

A. Trial Record Facts

During the summer of 1981, Mr. Thompson met David Leitch and other young adults who were living in

the Laguna Beach area of Southern California. Three weeks later, Mr. Thompson began staying at Leitch's studio apartment. RT 1534-35. Ginger Fleischli, with whom Leitch had had an intermittent romantic relationship (RT 2068, 2070), had been living at the apartment with Leitch before Mr. Thompson moved in, but had left and moved in with Leitch's ex-wife, Tracy. RT 1533-34, 1555.

Leitch was an alcoholic whose propensity for violence increased as he drank. RT 2083-84. Only days before Ms. Fleischli's death on September 11, 1981, Leitch blamed Ms. Fleischli for telling lies to his ex-wife, breaking up his marriage and stated that he hated Ms. Fleischli. RT 2276-79; *see also* Leitch RT 1079.[4] Also, in early September, Ms. Fleischli told the police that Leitch had threatened to kill her and that she was in fear for her life. RT 2218; Leitch RT 2157.[5]

On September 11, 1981, the night of Ms. Fleischli's death, Leitch, Mr. Thompson, Tracy Leitch, Ms. Fleischli and others met at a pizza parlor, where they drank beer.

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[4] "Leitch RT" refers to the transcript of Leitch's trial, which was made part of the record in Mr. Thompson's federal proceedings. J.A. 5.

[5] The State's assertion that "Fleischli expressed fear to Tracy Leitch (David's ex- wife) that she would be killed if she went with Thompson," State's Brief, at 7, is a gross misrepresentation. While Tracy Leitch initially testified that Fleischli asked her, "Do you think Tom would kill me?" she acknowledged on cross-examination that Fleischli had in fact questioned whether *"David would have* Tom kill me." *People v. Thompson*, 45 Cal.3d 86, 105 fn. 16, 246 Cal.Rptr. 245, 753 P.2d 37 (1988)(emphasis in original). By the time of Leitch's trial, Tracy's testimony was that Fleischli had laughed when she asked the question and that she (Tracy) considered it a joke and did not believe that Fleischli was serious about the matter. Leitch RT 2125.

RT 1564-65, 2307-09. David and Tracy Leitch eventually dropped Mr. Thompson and Ms. Fleischli at a bar where they met another acquaintance, Afshin "Shaun" Kashani. RT 1567-69. The three drank heavily and danced for several hours at this and another bar. Mr. Thompson and Kashani also smoked hashish. RT 1641-47. Sometime after 1:00 a.m., Mr. Thompson, Ms. Fleischli, and Kashani walked to the apartment. RT 1643. Ms. Fleischli went to a liquor store to get something to drink, and, while she was gone, Mr. Thompson told Kashani that he wanted to spend some time alone with her. RT 1647.

Mr. Thompson had no criminal record or history of violence. He testified that after Ms. Fleischli returned from the liquor store, they engaged in consensual intercourse. RT 2319-21. Afterwards, Mr. Thompson, who was an unusually heavy sleeper (RT 2273-74, 2279-80), passed out, and never saw Ms. Fleischli again. RT 2322.

On September 14, 1981, Ms. Fleischli's body was found partially buried in a grove of trees. RT 1474-79. It was wrapped in a sleeping bag and a blanket which had been given to Leitch by a friend. RT 1536. The body had been tied with Leitch's rope (RT 1524), had been transported in Leitch's car (RT 1776-80, 1787-93), and Leitch's footprint had been found near the body. RT 1525-29, 1563-64. Fibers on the body matched fibers from the carpet in Leitch's apartment, and Ms. Fleischli's blood was found on the back of the carpet. RT 1514-18, 1787.

Ms. Fleischli's shirt and brassiere had been cut up the front and pulled down to her elbows. RT 1500, 1502. She was wearing jeans that were fully zipped, and the belt was buckled, but the button at the waist was undone. RT 1504. She was not wearing underwear, shoes or socks. RT 1508. There were five stab wounds in the area of the right ear that had been caused by a single-edged blade, one of

which cut the carotid artery and was the cause of death. RT 1614-17, 1622. Leitch's knife, which was never recovered, was consistent with the stab wounds. RT 1614-17, 1934-38.

There was no tearing or bruising to the vagina. RT 1624. A vaginal swab indicated the presence of semen. RT 1771, 1795-97. A blood typing of the swab indicated Type A blood which could have been either the woman's or the man's. RT 1797-98. Ms. Fleischli, Mr. Thompson and Leitch were all Type A. RT 1808-1821. Ms. Fleischli's blood alcohol level at the time of her death was .16%. RT 2194. A woman of her size would require at least seven drinks to reach that level. RT 2223-2225.

Mr. Thompson and Leitch were arrested for Ms. Fleischli's murder. At the preliminary hearing, when they were joined as defendants, the prosecution pursued a theory that Mr. Thompson and Leitch were equally culpable. According to the prosecution, Leitch, who wanted his girlfriend dead so he could reconcile with his ex-wife, who was about to collect a personal injury settlement, hired Mr. Thompson to assist in the killing, and the two jointly carried it out. CT 234-433, 611-914, 918-1250. To support this theory, the prosecution presented the testimony of three jailhouse informants who testified that Mr. Thompson had told them that Leitch wanted Ms. Fleischli dead and had hired Mr. Thompson to help him (CT 729-30, 739-40), that Leitch had aided and abetted the commission of the crime (CT 719-28), that Mr. Thompson had had consensual sex with Ms. Fleischli beforehand, and that there had been no rape. CT 720-938-39, 972-73, 980.[6]

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[6] At the conclusion of the preliminary hearing, the court found that there was insufficient evidence to bind Mr.

Once Mr. Thompson's case was severed from Leitch's for trial, and Mr Thompson was to be tried first, the prosecution abandoned the joint culpability theory that it had presented at the preliminary hearing, and proceeded instead on the theory that Mr. Thompson alone had raped and murdered Ms. Fleischli.[7] This theory relied on two new jailhouse informants, Fink and Del Frate, who testified that Mr. Thompson confessed to each of them separately that he had raped Ms. Fleischli and killed her to cover up the rape. RT 1966-71, 1850-53. The prosecutor told Mr. Thompson's jury that the informants' testimony was "dispositive of any issues of fact left in this case." RT 2566.

Aside from the informants' testimony, the evidence offered by the prosecution to prove rape consisted of evidence regarding the condition of the deceased's body, particularly testimony from the coroner, Dr. Richards, that there were bruises on Ms. Fleischli's hands, wrists, left elbow, and ankles, which were caused by "the application of force" and "heavy handling" immediately prior to her death, and which suggested that she had been

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Thompson over on the rape charge or the rape special circumstance. CT 1249.

[7] Under this new theory, Leitch had nothing to do with the murder and was at most the driver of the car used to dispose of the body. RT 2648. At Leitch's trial, the prosecution returned to the theory that was presented at the preliminary hearing and argued that the rape-murder scenario presented at Mr. Thompson's trial was ludicrous (Leitch RT 2564), that Leitch had "the only motive or reason for [Fleischli's] demise" (Leitch RT 2570), and that "all the evidence we have incriminates Mr. Leitch, at best equally, and more so than Mr. Thompson." Leitch RT 2505. The differences between these two theories are evident from the comparison of the prosecutor's two closing arguments set out in the *en banc* court's opinion. J.A. 231-34.

restrained and raped. RT 1618-22, 1625, 1635-36, 1765-66. Although Dr. Richards acknowledged that there was no "anatomic evidence of rape," in the sense of vaginal injury (RT 1624, 1637), he testified that there is no vaginal injury in most rape cases, RT 1629-34, 1766, and that bruises to other parts of the body are a more certain indicator of rape. RT 1635-36. Deputy Sheriff Coder bolstered the rape theory by testifying that an injury to Ms. Fleischli's right wrist had been caused by a handcuff. RT 1748-49. The prosecutor emphasized this evidence, telling Mr. Thompson's jury that a finding of consensual sex "defies all the physical evidence in this case." RT 2559-60, 2633-36.

B. Evidentiary Hearing Record Facts

The prosecutor's medical/forensic evidence of rape was substantially impeached at the evidentiary hearing by evidence which trial counsel could have presented but did not present at trial. First, as the district court found, Dr. Richards' own autopsy report "provided fertile ground for challenging the accuracy of Richards' testimony." J.A. 16. It showed that there were no injuries to Ms. Fleischli's lower extremities that could have occurred at or near the time of death; there was only a single injury to each of her upper extremities that could have occurred at or near the time of death; as to those it could not be determined whether they had occurred before or after death; and there was, in the words of the coroner's own autopsy report, "remarkably little in the way of trauma" to the body. J.A. 11-14.

In addition, the injury to the right wrist, which the prosecution presented as an uncontroverted handcuff injury, could have been refuted. According to the pathologist called by Mr. Thompson at the evidentiary

hearing, the injury was inconsistent with a handcuff injury. J.A. 12-13. Furthermore, Ms. Fleischli was found wearing jeans that were fully zipped and belted, with the single button at the waist undone. RT 1504. According to expert testimony presented at the evidentiary hearing, if Ms. Fleischli had engaged in intercourse and she or another had then put on her jeans before she had douched or washed, there would have been semen drainage in the jeans. That none was found by the state criminalist suggested that she had douched or washed, which was consistent with the consensual intercourse testified to by Mr. Thompson and inconsistent with the rape charged by the prosecutor. J.A. 13.

It also was established at the evidentiary hearing that there was readily available evidence to impeach the credibility of the two informants, both of whom had lied about their history as informants and the benefits they had received for informing on criminal defendants. There was uncontroverted evidence, not presented at Mr. Thompson's trial, although available to trial counsel, that Fink had "an extensive history as an informant who frequently claimed that fellow inmates confessed their crimes to him while awaiting trial and who frequently received favors in exchange for cooperating with the police." J.A. 225. For example, during the period 1973-82, Fink had informed on eight defendants, including defendants in four murder cases, had claimed that each had spontaneously confessed to him, and in return had received favors from law enforcement on eight occasions. J.A. 20-22.

Fink also received benefits for informing on Mr. Thompson. First, in December 1981, the same day that Fink informed on Mr. Thompson, he listed an investigating officer in the Thompson case together with an Orange

County sheriff's investigator as friendly witnesses for his parole violation hearing. As a result, days later, Fink was released from custody without a hearing. J.A. 22-23. In addition, consistent with his well-documented *modus operandi* of seeking his rewards after the fact – evidence of which competent counsel would have presented to the jury – Fink received his rewards for testifying against Mr. Thompson after the trial. In August 1984, the prosecutor wrote to the parole authority that Fink's testimony had been crucial to the prosecution's case and requested that Fink be released from custody prior to Christmas. J.A. 22. In September 1984, the same prosecutor testified favorably for Fink at his parole revocation hearing. J.A. 22. At the evidentiary hearing, Mr. Thompson also established that prior to his trial, both the Orange County Sheriff's Office and the Orange County District Attorney's Office – the investigating and prosecuting agencies in Mr. Thompson's case – had labeled Fink as an "unreliable operator" (J.A. 230), a fact not discovered by trial counsel and not presented to Mr. Thompson's jury.

Fink had testified at trial that, in return for his testimony, he asked only that he serve the rest of the parole violation time in one prison rather than another. RT 1857, 1904-05. Because trial counsel did not present evidence of Fink's informant history and the numerous benefits Fink had received from law enforcement in return for his cooperation, the prosecutor was able to argue forcefully and repeatedly that, even though Fink was "no Boy Scout," he had asked for and would receive nothing in return for his testimony against Mr. Thompson, and therefore had no reason to lie. *See, e.g.*, RT 2565, 2637.

Del Frate, the other informant, testified at Mr. Thompson's trial that he was facing extradition to Oklahoma, where he was wanted on three charges, that

additional charges were pending in California and that he had been convicted of two felonies. RT 1978-79. Del Frate denied asking for any favors in exchange for his testimony against Mr. Thompson. J.A. 29.

There was uncontroverted evidence, not presented at Mr. Thompson's trial although available to trial counsel, that (a) Del Frate had been a police informant since the age of 14, had acted as an informant for four different state and federal law enforcement agencies, and had done so to avoid arrest and prosecution, and to receive money and other benefits; (b) two of the law enforcement agencies considered Del Frate an unreliable informant; (c) Del Frate's own father and brother considered him a pathological liar who had lied persistently since childhood; (d) Del Frate had five prior felony convictions, not the two to which he testified, and was wanted for several additional charges; (e) although Ms. Fleischli had been stabbed only in the head, Del Frate told the prosecution that Mr. Thompson claimed to have stabbed her in the neck, chest, "upper torso," and head, the exact words circulated by the police and contained in the newspaper accounts available to Del Frate; and (f) Del Frate also testified that Mr. Thompson had told him that he and Leitch had put Ms. Fleischli's body "in a shallow grave," a unique turn of phrase that was found in police reports and later reported in the newspapers. CT 468-75; J.A. 32-34.

Because of trial counsel's failure to present the readily available evidence to the contrary, the prosecutor was able to tell the jury that Del Frate "hasn't been an informant before." RT 2565.

C. District Court Findings

As the district court found and the *en banc* court agreed, the primary evidence that Mr. Thompson raped

Ms. Fleischli – the coroner's testimony of bruising to the body and the informant testimony – could have been critically impeached by competent counsel, and the failure of Mr. Thompson's counsel to do so undermined confidence in the outcome. J.A. 14-16, 24-27, 32-33, 220-227.

The district court found that trial counsel's failure to retain an independent pathologist and to challenge the medical/forensic evidence presented by the prosecution to prove rape, and trial counsel's failure to adequately investigate and present available evidence to impeach the two informants fell below the level of competence guaranteed by the Constitution. J.A. 9-33. The court found that Dr. Richards' trial testimony was "open to question" and could have been "seriously challenged" by competent counsel. J.A. 16. In addition, the court held that "had the jury learned the full extent of Fink's informant background, the jury would have disregarded his testimony," (J.A. 26), and that counsel's failure to impeach Del Frate "adds to the cumulative impact of [trial counsel's] ineffectiveness in defending the rape-charge." J.A. 33.

The court also found that trial counsel's testimony at the evidentiary hearing regarding the actions he had taken in preparing and presenting his client's defense and the reasons for those actions and inactions, was "inherently incredible," "did not ring true," and "defied common sense." J.A. 15, 16 n.12, 25, 26.

Finding that the prosecution's evidence to prove rape was "not substantial" and "far from overwhelming," the district court held that trial counsel's professional derelictions with respect to the medical/forensic evidence and the testimony of the jailhouse informants were prejudicial as to the rape conviction and rape special circumstance

finding, but not as to the first degree murder conviction. J.A. 15-16, 26-27, 33.

SUMMARY OF ARGUMENT

The *sua sponte* decision of the court of appeals to recall its mandate to prevent a fundamental miscarriage of justice was a lawful and proper exercise of judicial power and discretion. Although Title I of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") alters the law governing *habeas corpus* proceedings in federal court, it does not limit the power of courts of appeals to recall their mandates in appropriate circumstances. Although most of AEDPA pertains to the availability of relief in district court, several of its provisions are directed to the appellate courts.[8] However, no provision of AEDPA relates to the well-established authority of the courts of appeals over their mandates, and repeals by implication are not favored. *Felker v. Turpin*, 116 S.Ct. 2333, 2338 (1996); *Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 105 (1869). Congress had ample opportunity in AEDPA to limit the recall power, but chose not to.

It is a time-honored tradition of Anglo-American judicial procedure that courts have continuing jurisdiction, notwithstanding issuance of a mandate, to alter or amend a judgment in the interests of justice. Although the State and its *amici* talk about the present case as

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[8] Among these are provisions requiring "certificates of appealability" to obtain appellate review of the denial of *habeas* relief, 28 U.S.C. § 2253(c), requiring permission from circuit courts to seek subsequent relief, § 2244(b)(3), eliminating rehearing in a court of appeals and review by this Court of orders denying leave to seek subsequent relief, § 2244(b)(3)(E), and setting rigid time limits for appellate review of petitions originating from "opt-in" jurisdictions, §§ 2266(c)(1)(A)&(B).

though it were concerned exclusively with capital *habeas corpus* appeals, they offer no principled basis for distinguishing this subset of proceedings from the myriad cases in which the federal courts have always recognized and exercised a power to recall their own process when it is discovered to have worked a manifest injustice. Thus, their arguments for limiting the power would radically retract its well-established reach – a result they neither acknowledge nor come close to justifying.

The court of appeals, in keeping with the general practice of the courts, appropriately reserves the power to recall mandates for "unusual circumstances . . . sufficient to justify modification or recall of a prior judgment." *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *American Iron & Steel Institute v. Environmental Protection Agency*, 560 F.2d 589, 594-95 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978). This case presents such circumstances, as the *en banc* court expressly found. It marks no departure from the normal principle of prudent restraint, still less an abuse of discretion under that principle, which "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912); *accord Remington v. Central P. R. Co.*, 198 U.S. 95, 100 (1905) ("However stringent may be the practice in refusing to reconsider what has been done, it still is but practice, not want of jurisdiction, that makes the rule").

Before the mandate ever issued, Mr. Thompson filed a timely suggestion of the appropriateness of rehearing *en banc*. This was deemed rejected by operation of the court's internal operating procedures, but unbeknownst to Mr. Thompson, the suggestion produced both interest and activity within the court. As Mr. Thompson was later to learn, two judges of the court advised the panel – still

before the mandate had issued – that they wished to call for a vote under 28 U.S.C.§ 46(c) to rehear the case *en banc*. The author of the panel decision took the possibly unprecedented step of denying additional time to request a vote, and a series of misunderstandings led those two judges to believe that they no longer were entitled to institute an *en banc* vote.

After the mandate issued, the *en banc* court took *sua sponte* action effectively overruling the panel decision not to extend the time for voting, took the case *en banc*, and determined that rehearing was necessary to prevent a "manifest injustice." That action – grounded both on the confusion within the court regarding its internal operating procedures and on the merit of Mr. Thompson's claims for *habeas corpus* relief – was within the court's discretion to control its own process. The court determined that standing idly by would result in the unjust execution of one whose conviction was obtained in violation of the Constitution and who probably was innocent of the only crime that made him eligible for the death penalty. During three days of evidentiary hearings, Mr. Thompson presented powerful evidence that his trial attorney's defense against the rape charge – the only special circumstance allegation in the case – was wholly ineffective. The district court properly concluded that Mr. Thompson was prejudiced by his attorney's errors: "the evidence of rape was not substantial" (J.A. 16), "much of this evidence may not have been credible" (J.A. 36), and the evidence that "was presented was problematic and vulnerable to attack." J.A. 104. The *en banc* court properly affirmed those findings.

This Court should not determine that a breakdown in the Ninth Circuit's internal procedures governing *en banc*

voting rendered it powerless to grant relief from Mr. Thompson's unconstitutional conviction and sentence.

ARGUMENT

I.

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT, AND IN PARTICULAR 28 U.S.C. SECTION 2244(b)(1), DID NOT REMOVE THE JURISDICTION OF THE CIRCUIT COURTS TO RECALL THEIR MANDATES *SUA SPONTE* IN AN APPEAL OF A PETITIONER'S FIRST *HABEAS CORPUS* PETITION

28 U.S.C. § 2244(b)(1), as amended by section 106(b) of AEDPA, Pub.L. 104-132, 110 Stat. 1217, states: "A claim presented in a second or successive *habeas corpus* application under § 2254 that was presented in a prior action shall be dismissed."

By its terms, the section has no application to this case, which is the appeal of the district court judgment in Mr. Thompson's first *habeas corpus* proceeding under 28 U.S.C. § 2254.[9] Section 2244(b)(1) places limits on claims presented in a "second or successive" *habeas* petition; here the court granted relief based upon claims presented

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[9] The State fails to explain why section 2244(b)(1) applies to Mr. Thompson's habeas petition, filed in 1990, in light of this Court's ruling that "the new provisions of chapter 153 generally apply only to cases filed after the Act became effective." *Lindh v. Murphy*, 117 S.Ct. 2059, 2068 (1997). The State does argue that AEDPA applies to Mr. Thompson's Motion to Recall the Mandate filed on July 23, 1997. State's Brief at 17. However, the court of appeals made clear that it was acting *sua sponte* in recalling the mandate, and was not relying in any way on Mr. Thompson's motion. J.A. 214, 216.

by Mr. Thompson's first *habeas* petition.[10] By its plain language, section 2244(b)(1) is inapplicable to the court of appeals' jurisdiction to recall its mandate solely to "provide for the first time *en banc* review of Thompson's first *habeas* petition . . . [,] review . . . available to every *habeas* petitioner on his first petition upon majority vote of this court." J.A. 216.

Additionally, neither section 2244(b)(1) nor any other provision of AEDPA even mentions – much less limits – the jurisdiction of a court of appeals to recall its mandate in an appropriate case.[11] As this Court stated in *Felker v. Turpin*, *supra*, 116 S.Ct. at 2338, jurisdictional "[r]epeals by implication are not favored." In *Felker*, this Court declined to find that AEDPA impliedly repealed the Court's original *habeas* jurisdiction under 28 U.S.C. § 2241. As discussed hereafter, the inherent power of Anglo-American courts to recall their mandates or otherwise reopen their judgments to correct manifest error has been long recognized.[12] This power has been expanded

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[10] The State argues that the panel's decision on the merits was a "final judgment" on Mr. Thompson's petition, such that anything thereafter was subject to AEDPA. State's Brief at 12. However, as the author of the panel opinion acknowledged, "when the mandate is recalled, a first petition for writ of habeas corpus will be actively pending before the court." J.A. 195.

[11] In enacting AEDPA, Congress limited the jurisdiction of the court of appeals (and this Court) where it deemed it appropriate. *See, e.g.*, 28 U.S.C. § 2244(b)(3)(E) (court of appeals' grant or denial of authorization to file second or successive *habeas* application not appealable nor the subject of a petition for rehearing or a writ of *certiorari*).

[12] An equity rule "firmly established in English practice long before the foundation of our Republic" empowered a court to reopen judgments (even those entered during past terms) under appropriate circumstances, including where enforcement

and given added flexibility in modern judicial procedure.[13] If (as *Felker* held) AEDPA did not repeal this Court's original *habeas* jurisdiction by implication, it is difficult to imagine that AEDPA undid *sub silentio* a well-established aspect of judicial authority that bears far less connection to any subject addressed or implicated by AEDPA than does this Court's *habeas* jurisdiction.[14]

Claiming that Mr. Thompson's motion to recall the mandate was based on newly discovered evidence, the State accuses the court of appeals of "reformulating" that

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of the judgment would be "manifestly unconscionable." *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244-245 (1944).

[13] All circuits have recognized the availability of the mandate recall power in order "to prevent an injustice, or to preserve the integrity of the judicial process." *Ute Indian Tribe of Unitah & Ouray Reservation v. Utah*, 114 F.3d 1513, 1522 (10th Cir. 1997), *petition for cert. filed*, Sept. 29, 1997; see note 20 *infra*.

[14] The inherent power of the judiciary to correct its own errors is a power separate from that, if any, which entitles a party to litigate his or her claims anew. *See* 18 *Moore's Federal Practice*, § 131.02(1)(a) (3d ed. 1997); *Intermill v. Nash*, 75 P.2d 157, 160-61 (Utah 1938) (collecting cases). AEDPA affects only the latter. Nor is the recall power inconsistent with congressional intent. Congress' purpose in enacting section 2244(b) was to extend the doctrine of *res judicata* (albeit in slightly watered-down form) to *habeas corpus* cases, which prior law had placed beyond its reach. *See generally, McCleskey v. Zant*, 499 U.S. 467, 479-80 (1991); H.R. Rep. No. 470, 103rd Cong., 2d Sess. (1994); Judicial Conference of the United States, Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, Report and Proposal (Aug. 23, 1989). Even undiluted, *res judicata* has never been seen as a limit on a court's power to correct its own judgments. *See Ute Indian Tribe of Unitah & Ouray Reservation v. Utah, supra*, 114 F.3d at 1421-24; *NLRB v. Coca-Cola Bottling Co. of Buffalo, Inc.*, 55 F.3d 74, 77 (2d Cir. 1995); *Watts v. Pinckney*, 752 F.2d 406, 408-09 (9th Cir. 1985).

motion in order to accomplish an "end run" around AEDPA. State's Brief at 21-23. To the contrary, the court explicitly denied any reliance on Mr. Thompson's motion:

> We act to review the panel's decision not because of any new evidence offered by Thompson nor because of any new argument or ground for relief he suggests; nor do we act because Thompson presents any second or successive claim for relief. Although, in the interest of comity, we delayed action until Thompson's state court proceedings had concluded, we act now because we have *sua sponte* concluded that the interests of justice require us to afford Thompson the *en banc* process we should have initiated immediately after the panel's decision.

J.A. 214.[15]

This disclaimer by the appellate court lays to rest the State's unfounded charges that "Thompson's eleventh-hour newly discovered evidence claim was the actual catalyst for the *en banc* majority's actions" and that the explanation for those actions "rests with the Ninth Circuit's exposure to Thompson's claim of newly discovered

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[15] The State also argues that the court of appeals must have been "responding to Thompson's eleventh-hour motion. Otherwise, the Ninth Circuit undoubtedly would have acted before the filing of Thompson's Motion to Recall the Mandate." State's Brief at 23. The argument ignores the court's explanation that, shortly after the issuance of the mandate on June 11, 1997, there was a *sua sponte* request to consider *en banc* whether to order its recall; and, through a consultative process within the court and in the interest of comity, "the court decided to postpone action on whether *sua sponte* to recall the mandate until after Thompson concluded his state court habeas proceedings and filed a further request for review in this court." J.A. 214-215.

evidence." J.A. 214; *Cf., Missouri v. Jenkins*, 495 U.S. 33, 49 (1990).[16]

The Ninth Circuit's decision is fully consistent with the practice of that court, acknowledged by the State (Brief at 19), and unaffected by this decision, to deny a motion to recall the mandate where the petitioner seeks a recall "not to nullify an erroneous decision, but to reopen the proceeding so that he may present new claims that now cannot be addressed in a subsequent petition" in light of AEDPA and *McCleskey v. Zant*, 499 U.S. 467 (1991). *Nevius v. Sumner*, 105 F.3d 453, 461 (9th Cir. 1996); *see also, Williams v. Calderon*, 83 F.3d 281, 289 (9th Cir. 1996). The decision herein is consistent also with that court's holding, also unaffected by the decision herein, that a motion under Fed. R. Civ. P. 60(b) ordinarily will be treated as a successive petition if it raises new claims. *See, e.g., Clark v. Lewis*, 1 F.3d 814, 825-826 (9th Cir. 1993); *Bonin v. Vasquez*, 999 F.2d 425 (9th Cir. 1993).

Finally, the appellate court's recall of the mandate on its own motion does not implicate the policies underlying AEDPA nor otherwise violate the "spirit" of that legislation. State's Brief at 15. ADEPA's provisions regarding second or successive *habeas* applications, including 28 U.S.C. § 2244(b)(1), were designed to prevent abuse of the

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[16] Contrary to the State's assertions, Mr. Thompson's motion to recall the mandate did not seek consideration of new claims. As is plain from a review of the briefs, Mr. Thompson recognized that newly discovered evidence forming the factual basis for new claims was not appropriately the subject of a motion to recall the mandate. Mr. Thompson contended, however, that the new evidence could be considered by the *en banc* court to make a threshold determination of the existence of extraordinary circumstances necessary for recalling the mandate. J.A. 203.

writ by inmate petitioners who engage in piecemeal *habeas* litigation. That purpose is not even arguably disparaged when a court of appeals acts on its own motion to provide further review of an inmate petitioner's first *habeas* petition. As the court of appeals stated:

> We are acting not upon the basis of Thompson's petition, but upon the basis of our *sua sponte* determination to remedy our own errors. AEDPA and *McCleskey* are aimed at abusive efforts by petitioners to file second or successive petitions, not at a court's *sua sponte* determination that it must take further action on a first petition in order 'to prevent injustice [and] to protect the integrity of its process.'

J.A. 216.

Thus, neither 28 U.S.C. § 2244(b)(1), nor AEDPA in general, limit the jurisdiction of the court of appeals or prohibit the *sua sponte* recall of the mandate in this case.

II.

THE COURT OF APPEALS DID NOT ABUSE ITS DISCRETION WHEN IT RECALLED THE MANDATE TO PROTECT THE INTEGRITY OF ITS PROCESSES AND TO PREVENT A POSSIBLE MISCARRIAGE OF JUSTICE

The court of appeals found that its "normal *en banc* process did not function in the intended manner" (J.A. 214) and that, but for the court's errors (J.A. 216), an *en banc* call with respect to Mr. Thompson's first petition for *habeas corpus* "would have been made and voted on at the ordinary time." J.A. 214. Noting that "there has been no occasion in the past several decades in which this court has made a similar error" (J.A. 216-17), the court concluded that "*our* mistake should not prevent . . . a full and fair consideration of his [Thompson's] claims. . . . " J.A.

217, emphasis in original. The court believed that its errors, considered individually and collectively with the possibility that the panel's fundamental errors of law would lead to a miscarriage of justice, imposed on the court " . . . an obligation to recall the mandate in order to preserve the integrity of the judicial process." J.A. 214.

Although there is some disagreement about certain events, it is unnecessary to resolve it. The opinion of the *en banc* court, which the majority of all active judges of the court determined to leave undisturbed, recites facts not disputed by any member of the court, which establish that the decision to recall the mandate was well within the court's authority and discretion.

The events were as follows: "No active judge requested an *en banc* vote when the panel's initial opinion was filed in September, 1996." J.A. 214, majority. (The failure may have been due either to "the misplacing or non-arrival in a judge's chamber" of a form computer message (J.A. 243, Reinhardt), or to the failure of two law clerks to communicate with each other (J.A. 257-58, Kozinski), or to some other reasons not known by the parties.)

The panel filed its order denying rehearing together with an amended opinion on March 6, 1997. J.A. 215, majority. On March 12 and 13, "Two judges . . . advised the panel that they wished to call for an *en banc* vote." J.A. 215, majority. However, "A series of misunderstandings led those judges to believe that the time for an *en banc* vote had passed, and that they were prohibited from making an *en banc* call at that time." J.A. 215 majority. (These may have included the possibly unprecedented refusal of the author of the panel opinion to accede to the request for an *en banc* vote and his statement that the *en banc* coordinator had stated that the last day on which a

timely call could be made was January 31, 1996. J.A. 258, Kozinski.) In fact, the request to the panel was timely under the court's rules. J.A. 215 n.2, majority. But "because of misunderstandings or error by members of the court, no *en banc* vote was taken when it ordinarily would have occurred." J.A. 215, majority.

"A *sua sponte* request to consider *en banc* whether to recall the mandate was made shortly . . . [after the mandate was issued], even before the mandate was spread in the district court." J.A. 215, majority. "Through a consultative process, the court decided to postpone action on whether *sua sponte* to recall the mandate until after Thompson concluded his state court *habeas* proceedings and filed a further request for review in this court." J.A. 215, majority.

A. The Courts of Appeals Have Broad Discretion To Recall Their Mandates, And That Discretion Was Appropriately Exercised Here

Both the authority of the courts of appeals to recall their mandates and the flexibility that they must be afforded in the exercise of that authority are unquestioned. 16 Wright, Miller & Cooper, *Federal Practice and Procedure*, § 3938 at 7612 (2d ed. 1996). All judgments "are under the control of the court which pronounces them during the term in which they are rendered or entered of record, and they may then be set aside, vacated, modified or annulled by that court." *Bronson v. Schulten*, 104 U.S. 410, 415 (1881). Even before the expiration of a term or session lost all significance, 28 U.S.C. § 452, an appellate court had the authority to recall its mandate and issue a new mandate setting aside judgments that had been final during a previous term. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).

As has every circuit court,[17] this Court has recognized that the authority to recall the mandate is within the inherent power of the courts of appeals and that it is not limited by any formal rule. *See, e.g. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948).

Nor is the exercise of the court's authority confined, as suggested in the dissents below, by either the local circuit rules or the Federal Rules of Appellate Procedure. *A to Z Portion Meats v. NLRB*, 643 F.3d 390, 392 n.1 (6th Cir. 1980) ("Since the power of a court to recall its mandate is rooted in the inherent power of the court . . . the

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[17] *Powers v. Bethlehem Steel*, 483 F.2d 963 (1st Cir. 1973); *United States v. Aristezebal*, 100 F.3d 236 (2d Cir. 1996); *Sargent v. Columbia Forest Prods.*, 75 F.3d 86 (2d Cir. 1996); *American Iron & Steel Institute v. Environmental Protection Agency*, 560 F.2d 589 (3d Cir.), *cert. denied* 435 U.S. 914 (1978); *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977); *Uzzell v. Friday*, 625 F.2d 1117 (4th Cir.) (*en banc*), *cert denied*, 446 U.S. 951 (1980); *Meredith v. Fair*, 306 F.2d 374 (5th Cir.), *cert. denied*, 371 U.S. 828 (1962); *National Surety Corp. v. Charles Carter & Co.*, 621 F.2d 739 (5th Cir. 1980); *Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984); *Patterson v. Crabb*, 904 F.2d 1179 (7th Cir. 1990); *United States v. Holland*, 1 F.3d 454, 455 (7th Cir. 1993) (" . . . It is well established that . . . it is within the inherent power of the court to recall its mandate to protect the integrity of its own processes. . . . "); *Smith v. Armontrout*, 865 F.2d 1515 (8th Cir. 1989); *Simmons v. Lockhart*, 856 F.2d 1144 (8th Cir. 1988); *Bryant v. Ford Motor Co.*, 886 F.2d 1526 (9th Cir. 1989) *cert. denied*, 493 U.S. 1076 (1990); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988); *Ute Indian Tribe of Unitah & Ourays Reservation v. Utah*, 114 F.3d 1513, 1522 (10th Cir. 1997) ("In this circuit, as in all circuits that have addressed the issue, an appellate court has power to set aside at any time a mandate . . . to prevent an injustice, or to preserve the integrity of the judicial process."); *Scott v. Singletary*, 38 F.3d 1547 (11th Cir. 1994); *Judkins v. Beech Aircraft Corp.*, 745 F.2d 1330 (11th Cir. 1984); *Application of Jones*, 542 F.2d 65, 68 (C.C.P.A. 1976); *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980) (" . . . an inherent power to recall a mandate upon a showing of good cause.").

Federal Rules of Appellate Procedure and the Rules of our circuit, including the time periods associated with those rules, are not applicable here"); *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980) ("The power of a court to recall its mandate emanates not from the Federal Rules of Appellate Procedure or the Rules of our circuit, but from an inherent power to recall a mandate upon a showing of good cause"); *Sparks v. Duvall City Rock Co.*, 604 F.2d 976 (5th Cir. 1979), *aff'd*, 449 U.S. 24 (1980).

The exercise of the recall power is, of course, reviewable by this Court for abuse of discretion. *See, e.g. Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306 (1948); *Hawaii Housing Authority v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, C. J., in chambers) ("I think it [recalling a mandate] probably lies within the inherent power of the court of appeals and is reviewable only for abuse of discretion."). For example, recalling a mandate for no discernible reason after a considerable lapse of time has led a party to change positions in reliance on his or her supposed victory might constitute such an abuse.[18] However, abuse of this power by the courts of appeals has rarely, if ever, been brought to the attention of this Court, and none has occurred in this case.

In *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra*, 322 U.S. at 248, this Court noted that its authority to reopen its judgments "has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustice involved in these situations." The authority of the courts of appeals is equally flexible. "Above all, though, recall of a mandate is a mode of relief that falls within the ambit of

[18] Here the mandate was recalled a scant 53 days after its issuance.

the court's discretion," to be exercised on a "case by case basis." *American Iron & Steel Institute v. Environmental Protection Agency, supra*, 560 F.2d at 594-95, 598-99. The grounds that justify a recall are as varied as the cases that come before the courts and "range from the most severe, such as frauds upon the court, to the more mundane, for example, correction of a clerical mistake." *Dilley v. Alexander, supra*, 627 F.2d at 410-411.[19]

[19] *Accord, United States v. Skandier*, 1997 U.S. App. Lexis 26097 (3d Cir. September 22, 1997) (recall of mandate is discretionary both "to prevent injustice or otherwise for good cause"); *Ute Indian Tribe of Unitah & Ourays Reservation v. Utah, supra*, at 1522 ("to prevent an injustice, or to preserve the integrity of the judicial process"); *United States v. Salameh*, 84 F.3d 47, 51 (2d Cir. 1996) ("specification of conditions to restore jurisdiction . . . cannot be exclusive . . . Otherwise, we would have divested ourselves permanently of authority to exercise our appellate jurisdiction"); *Canal Ins. Co. v. First Gen. Ins. Co.*, 901 F.2d 45 (5th Cir. 1990) (in the interest of justice); *Zipfel v. Halliburton Co., supra*, at 567 (for "good cause" or to "prevent injustice"); *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987) ("to prevent an injustice"); *Johnson v. Bechtel Associates Professional Corp.*, 801 F.2d 412, 415 (D.C. Cir. 1986) ("showing of good cause"); *National Surety Corp. v. Charles Carter & Co., Inc.*, 621 F.2d 739, 741 (5th Cir. 1980) (to prevent injustice); *Lamb v. Farmers Ins. Co.*, 586 F.2d 96, 97 (8th Cir. 1978) ("in order to ensure that appellant's appeal is given fair consideration"); *American Iron & Steel Institute v. Environmental Protection Agency, supra*, at 592 ("in appropriate instances" "for good cause" "to prevent injustice" "in special circumstances" "such phrases indicate that exercise of the authority . . . falls within the discretion of the court" on "a case by case basis"); *Reserve Mining Co. v. Lord*, 529 F.2d 181, 188 (8th Cir. 1976) ("in the exercise of this court's supervisory power and in order to protect the integrity of this court's mandate"); *Dickerson v. Continental Oil Co.*, 476 F.2d 635, 636 (5th Cir. 1973) ("on a proper showing").

This Court has recognized that circuit courts of appeals have the authority to apply this flexible power "to protect the integrity of the court's own processes." *Briggs v. Pennsylvania R. Co., supra*, 334 U.S. at 306. The authority clearly may be exercised, in the court's discretion, to correct the court's own errors which, if left uncorrected, would undermine the integrity of its processes. *Sargent v. Columbia Forest Prods.*, 75 F.3d 86 (2d Cir. 1996); *United States v. Holland*, 1 F.3d 454, 455-56 (7th Cir. 1993); *Loughman v. Consul-Pennsylvania Coal Co.*, 6 F.3d 88, 96 (3d Cir. 1993) ("As the error . . . was ours, we would *sua sponte* recall the mandate"); *Patterson v. Crabb*, 904 F.2d 1179 (7th Cir. 1990) (court recalled the mandate because it determined that it had misread the record and erroneously dismissed an appeal); *Wolfel v. Bates*, 749 F.2d 7 (6th Cir. 1984) (mandate recalled *sua sponte* to correct an error in the court's opinion which prevented a "fair determination" on the merits); *United States v. Raineri*, 670 F.2d 702, 719 (7th Cir.) (mandate recalled because court of appeals erroneously failed to stay issuance), *cert. denied*, 459 U.S. 1035 (1982); *Uzzell v. Friday, supra*, 625 F.2d at 1120 (mandate recalled because the court determined that prior *en banc* court had been improperly constituted, "We should take steps to remedy our own oversight"); *Lamb v. Farmers Ins. Co.*, 586 F.2d 96, 97 (8th Cir. 1978) (appeal reinstated because court failed to timely file papers). If these errors, which were generally far less tortuous and of less consequence, could be corrected through the recall of the mandate, surely the court of appeals has acted within its discretion in this case.

The State's concern, echoed in the dissents below, that if this decision is permitted to stand a flood of meritless petitions for *en banc* rehearing will drown the courts, is specious. The Ninth Circuit has already demonstrated its ability to recognize and deny improper

motions to recall its mandate, as well as its understanding of AEDPA. *See, e.g., Nevius v. Sumner*, 105 F.3d 453 (9th Cir. 1996); *Greenawalt v. Stewart*, 105 F.3d 1268 (9th Cir.), *cert. denied*, 117 S.Ct. 794 (1997). As the Second Circuit, in rejecting the same argument, noted, "The opportunity to seek reinstatement of a remanded appeal does not assure success. This court retains full authority to distinguish between meritorious applications and tactical maneuvers." *United States v. Salameh*, 84 F.3d 47, 49 (2d Cir. 1996); *see also, American Iron & Steel Institute v. Environmental Protection Agency, supra*. The same point was made by this Court in *Agostini v. Felton*, 117 S.Ct. 1997 (1997), in which Justice O'Connor noted that the fear that the relief granted from a twelve-year old judgment would result in a "deluge" of similar requests was "overstated," because the Court's decision was "intimately tied to the context in which it arose." So, here, was the court of appeal's order tied to the specific context of an unprecedented series of errors which persuaded the court that it should act because of the court's "firm belief that this is an exceptional case requiring recall of the mandate in order to prevent an injustice" and to "protect the interests of . . . [the court's] process." J.A. 220. In doing so, the court acted well within its discretion.

B. The "Law Of The Case" Doctrine Is No Bar To The Exercise Of the Court's Discretion In This Case

The State contends that the court abused its discretion when it recalled its mandate to correct its own errors because the recall is prohibited by the "law of the case" doctrine. The law of the case doctrine cannot be properly applied to immunize this case from *en banc* review; it restricts only district courts and other panels of the courts of appeals. *See, e.g., Van Gemert v. Boeing Co.*, 590 F.2d 433,

436-37 n.9 (2d Cir. 1978), *aff'd*, 444 U.S. 472 (1980); *Shimman v. International Union of Operating Eng's, Local 18*, 744 F.2d 1226, 1229 n.3 (6th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985) ("The law of the case doctrine . . . does not impair the power of an *en banc* court to overrule any panel decision.").

"It has always been recognized that the 'law of the case' is a doctrine of 'judicial administration' that does not limit the power of the appellate court." *Hazel-Atlas Glass Co. v. Hartford-Empire Co., supra*, 322 U.S. at 244; *accord Arizona v. California*, 460 U.S. 605, 618 (1983) ("Law of the case directs a court's discretion, it does not limit the tribunal's power"); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (" . . . merely expresses the practice of courts generally . . . not a limit to their power"); *Remington v. Central P. R. Co.*, 198 U.S. 95, 100 (1905).

Recognizing that concern for finality, which underlies the law-of-the-case doctrine, must yield to the obligation to do justice when the circumstances demand reconsideration, this Court has reopened its judgments in such circumstances. *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25 (1965); *United States v. Ohio Power Co.*, 353 U.S. 98 (1957); *see also, Cahill v. New York, N. H. & H. R. Co.*, 351 U.S. 183 (1956); *Zap v. United States*, 330 U.S. 800 (1947); *Loumar, Inc. v. Smith*, 698 F.2d 759, 762 (5th Cir. 1983).

The State's second finality argument – that this Court's denial of Mr. Thompson's prior petition for *certiorari* prevents the court of appeals from recalling its mandate – is equally incorrect. The authority of the courts of appeals to recall their mandates is unaffected by the fact that a petition for *certiorari* has been denied. "The denial of a writ of *certiorari* imports no expression of opinion upon the merits of the case. . . . " *United States v.*

Carver, 260 U.S. 482, 490 (1923). Courts of appeals frequently recall their mandates following the denial of petitions for *certiorari*. See, e.g., *Sargent v. Columbia Forest Prods., supra*; *Bryant v. Ford Motor Co., supra*; *Alphin v. Henson*, 552 F.2d 1033 (4th Cir.), *cert. denied*, 434 U.S. 823 (1977).

C. *En Banc* Consideration Was Appropriate And Within The Court's Discretion

The State's argument that the court's decision to recall its mandate to consider this case *en banc* was an abuse of discretion is without merit. 28 U.S.C. § 46(c) empowers a court of appeals to hear a case *en banc*. "The manner in which that power is to be administered is left to the court itself." *Western P. R. Corp. v. Western P. R. Co.*, 345 U.S. 247, 259 (1953). "Because section 46(c) is a grant of power, and nothing more, each court of appeals is vested with a wide latitude of discretion to decide for itself just how that power shall be exercised." *Id.* The State's argument that the exercise of this power is constrained by the general orders of the court of appeals is wrong. " . . . [A] majority always retains the power to revise the procedure and withdraw whatever responsibility may have been delegated to the division." *Id.* at 256. This Court has declined to micromanage the *en banc* process because to do so would involve the Court "unnecessarily in the internal administration of the Courts of Appeals." *Shenker v. Baltimore & O. R. Co.*, 374 U.S. 1, 4-5 (1963).

The State's view of the circumstances in which an *en banc* rehearing is appropriate (Brief at 33) is unduly narrow. The provisions of Rule 35(a) are qualified by the word "ordinarily" and do not cabin the authority of a court of appeals to recall its mandate and to rehear a

matter *en banc*.[20] *En banc* consideration is appropriate to correct the error of a three-judge panel "in order to cure a gross injustice," *United States v. Lynch*, 690 F.2d 213, 215 n.22 (D.C. Cir. 1982); *a fortiori*, it is available to correct errors of the court which prevent the normal *en banc* process from functioning in the intended manner and which risk the execution of a person for an offense that is not legally eligible for capital punishment. An *en banc* court "may overrule any panel decision that a majority of the active judges believes is wrongly decided, unless a party would be seriously prejudiced as a result." *Van Gemert v. Boeing Co., supra*, 590 F.2d at 436-437 n.9. Thus, even if the *en banc* court had reversed the three-judge panel only because it determined that the panel had wrongly decided the case, it was well within its "wide latitude of discretion" to do so. *Western P. R. Corp. v. Western P. R. Co., supra*, 345 U.S. at 259.

III.

THE *EN BANC* COURT OF APPEALS CORRECTLY CONCLUDED THAT THE THREE-JUDGE PANEL COMMITTED ERRORS OF LAW THAT WOULD RESULT IN A MANIFEST INJUSTICE SUFFICIENT TO JUSTIFY RECALLING ITS MANDATE

The parties have been directed to address the question whether "the Ninth Circuit, sitting *en banc*, erred in concluding that the three-judge panel 'committed fundamental errors of law that would result in manifest injustice' sufficient to justify recalling the mandate." The *en*

[20] In like fashion, this Court has recognized that its authority to grant a petition for a writ of *certiorari* is not constrained by the factors enumerated in Rule 10 of this Court, and petitions have been granted in cases which do not appear to satisfy the literal terms of the Rule.

banc court of appeals made two separate determinations regarding the legal issues presented in Mr. Thompson's appeal, first, in deciding whether to recall the mandate *sua sponte*, and second, in deciding the merits of the case *en banc* after the mandate had been recalled. As the court stated:

> Our inquiry here thus has a two-fold objective: First, we must determine whether the panel may have been wrong, and whether if we fail to act we may be perpetrating a manifest injustice; if so, we must recall the mandate. Second, once we do, we must determine on the merits whether *habeas* relief should be granted.

J.A. 219.[21]

With respect to the first prong of the inquiry, i.e., whether to recall the mandate, the *en banc* court reached the following conclusions: (1) "In reversing the district court, the panel appears to have made fundamental

[21] The phrase "committed fundamental errors of law that would result in manifest injustice," quoted in the third question, is from the *en banc* court's explanation of its decision to both "*sua sponte* recall the mandate *and* reverse the panel's opinion." J.A. 212 (emphasis added). The State interprets the question framed by the Court as evincing the Court's intent to, itself, apply *Strickland v. Washington vel non*. Respondent questions whether that is the Court's intent. *Cf. Kyles v. Whitley*, 115 S.Ct. 1555, 1576 (1995) ("The Court has adhered to the policy that, when the petitioner claims only that a concededly correct view of the law was incorrectly applied to the facts, *certiorari* shall generally *i.e*, except in cases of the plainest error, be denied") (Scalia, J., joined by Rehnquist, C.J., Kennedy, J. and Thomas, J., *dissenting*). Respondent believes that the possible merit of the *Strickland* claim is pertinent here only to the degree that it sheds light on whether the lower court abused its discretion in recalling its mandate.

errors of law that if not corrected, would lead to a miscarriage of justice" (J.A. 214); (2) "[a]t the very least, questions of the most serious nature exist as to the panel's reversal of the district court's finding that counsel's ineffectiveness raised a reasonable probability that the jury convicted Thompson of a rape he did not commit and then erroneously sentenced him to die for a capital offense" (J.A. 218); (3) "[i]n addition, a serious question exists as to whether Thompson was deprived of due process of law by the prosecutor's presentation of flagrantly inconsistent theories, facts, and arguments to the two juries that separately heard Thompson's case and that of his co-defendant, David Leitch" (J.A. 218); and (4) "[w]hen we examine the totality of the circumstances (both substantive and procedural), the grave questions that exist regarding Thompson's innocence of any capital offense, the likelihood that the panel's decision is erroneous, and the consequences that would flow from allowing an erroneous decision to go unreviewed, we are persuaded that the circumstances involved are extraordinary." J.A. 218-219.

With respect to the second prong of the inquiry, having recalled the mandate, the *en banc* court reviewed the merits of the district court's partial grant of *habeas* relief (J.A. 220), and affirmed relief as to the rape conviction, the rape special circumstance, and the death penalty, while remanding to the district court for further proceedings concerning the first degree murder conviction. Although only the first prong of the court of appeals' inquiry appears to be implicated by the Court's question, the *en banc* court's answers to both prongs of the inquiry are fully supported by the record.

A. The *En Banc* Court's Review Of The Three-Judge Panel's Decision Was Well Within The Court's Wide Latitude Of Discretion

The State argues that the issues presented by this case were unworthy of consideration *en banc*. The State's argument fails to recognize the "wide latitude of discretion" accorded a court of appeals to hear or rehear cases *en banc*. *Western P. R. Corp. v. Western P. R. Co., supra,* 345 U.S. at 259. The State relies on *Northern Helex Co. v. United States,* 634 F.2d 557, 562 (Ct. Cl. 1980) for the proposition that the *en banc* court was powerless to recall the mandate to decide the merits of the appeal unless it was "convinced to a certainty" that the panel's opinion was incorrect. State's Brief, at 36. That Court of Claims case, however, was concerned only with the doctrine of the law of the case. As discussed above, the law-of-the-case doctrine is inapplicable to *en banc* review. *See, Van Gemert v. Boeing Co., supra,* 590 F.2d at 436-37 n.9.

The State next contends that the *en banc* court had "no basis for substituting its judgment" for the judgments of the jury, the California Supreme Court or the three-judge Ninth Circuit panel. State's Brief, at 38, 39. The State's rhetoric regarding the sanctity of the jury's verdict is beside the point because the jury was totally unaware of the facts that led the district court and the *en banc* court to conclude that Mr. Thompson's conviction was constitutionally infirm and that he is probably not guilty of any capital offense. The State's reference to the California Supreme Court is amiss for much the same reason.[22]

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[22] The California Supreme Court summarily denied Mr. Thompson's state *habeas* petition without issuing an order to show cause or ordering an evidentiary hearing. It was therefore not privy to the evidence that led the *en banc* court below to affirm the judgment of the district judge who, after conducting

Also without merit is the State's argument that the Ninth Circuit's decision to rehear this case *en banc* was inappropriate insofar as the majority's opinion reflects nothing more than a disagreement among jurists as to how to apply the law to the facts. State's Brief at 36-39. The panel's erroneous reversal of the district court, if allowed to stand, would constitute a manifest injustice, given that trial counsel's ineffective assistance created substantial questions as to whether Thompson is innocent of the death-qualifying offense of rape. J.A. 214. The potential injustice certainly provided grounds for the court to rehear the case *en banc*. Moreover, the *en banc* court's reversal of the panel does not reflect merely a disagreement about the application of legal principles to the facts. The three-judge panel committed fundamental errors of law by misapplying well-established constitutional principles.

B. The Panel's Finding Of No Prejudice From Trial Counsel's Derelictions Was Based On Both A Failure to Accord Due Deference To The District Court's Findings Of Fact And A Misapplication Of Sixth And Fourteenth Amendment Principles

The *en banc* court correctly held that the panel had committed fundamental errors of law in reversing the district court's finding of prejudicial, ineffective assistance of counsel. The district court found that trial counsel's decision not to refute the rape evidence was "flawed" (J.A. 14), that he "had no valid tactical reason for not attacking the rape evidence," and that his testimony, intended to excuse his conduct, was "inherently

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an evidentiary hearing and reviewing voluminous documents, held that trial counsel's unreasonable failure to challenge the evidence of rape undermined confidence in the verdicts.

incredible," did not "ring true," and "defie[d] common sense." J.A. 15, 25, 26. As the *en banc* court noted, "the district court found, and the panel assumed, that [trial counsel's] failure to investigate, develop, and present evidence rebutting the State's forensic evidence of rape fell below a reasonable standard of professional representation." J.A. 223. However, while the district court held that the deficient performance was prejudicial in light of the critical importance of the medical/forensic evidence and informant testimony to the prosecution's case, the panel determined that there was no prejudice, and reversed. As the *en banc* court explained, the panel

> . . . concluded that counsel's assumed incompetence in failing to rebut the State's forensic evidence and to investigate and impeach witnesses whose history gravely undermines the reliability of their testimony did not affect the outcome of Thompson's trial. It reached this conclusion after the district court had explained carefully and persuasively, on the basis of its credibility determinations and assessment of the physical evidence, why the result probably would have been different with respect to the rape charge and the rape special circumstance finding.

J.A. 218.

1. The Panel Failed To Defer To The District Court's Findings of Fact.

The panel determined that trial counsel's failure to rebut "certain aspects" of the prosecution's case (J.A. 150) was not prejudicial because counsel's performance had been credible in other aspects. Thus, the panel found that counsel ably impeached Dr. Richards by "pressing" him "strongly" on the issue of whether the absence of vaginal injury was significant to whether a rape occurred (J.A.

149), and by adequately eliciting other concessions. J.A. 150. However, this directly conflicts with the district court's findings that Dr. Richards' testimony was "open to question" and that counsel had unreasonably failed to challenge the accuracy of Dr. Richards' testimony. J.A. 14-16. The panel also credited trial counsel's claimed tactical decision not to "emphasize the possibility of rape by spending an inordinate amount of time on the evidence of bruises." J.A. 147. In doing so, the panel disregarded the district court's findings of fact that trial counsel was not truthful, that he had conducted no investigation on which to base a tactical decision, and that he did not make any reasonable tactical decisions. J.A. 14-15, 24-26. The panel also found that the informants were "extensively cross-examined and discredited by [trial counsel]" (J.A. 154), and that there was therefore no prejudice from the failure to impeach them further. J.A. 153, 154. Again, the panel's opinion is at odds with the findings of the district court, which found that counsel "did not take the steps necessary to ensure that the jury had an adequate basis for judging Fink's credibility" (J.A. 26), and that counsel should have impeached Del Frate with his prior testimony regarding his informant history. J.A. 32.

The panel, thus, improperly rejected the district court's fact findings and decided factual issues *de novo*. As this Court has stated:

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous . . . When findings are based on determinations regarding the credibility of witnesses, rule 52(a) demands even greater deference to the trial court's findings. . . .

Anderson v. City of Bessemer City, 470 U.S. 564, 573-75 (1985) (citations omitted); *see also, Amadeo v. Zant*, 486 U.S. 214, 226 (1988); *White v. Estelle*, 459 U.S. 1118, 1122 (1983) (appellate court bound by implied findings of fact where the district judge's "view of the facts is plain from his opinion or because of other indicia").

2. The Panel Misapplied Constitutional Principles In Finding No Prejudice From Counsel's Failure To Challenge The Medical/Forensic Evidence

The district court found that the evidence that a rape had occurred was not substantial, may not have been credible, and was open to attack. J.A. 16, 36. Mr. Thompson demonstrated, at the evidentiary hearing, that the medical examiner's testimony that there were numerous injuries to the hands, arms, and legs, which occurred close to or at the time of death, was not true J.A. 9-14,[23] and the district court concluded that trial counsel's failure to rebut the forensic

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[23] The State's complaint that it was not permitted to cross-examine Dr. Root, the pathologist called by Mr. Thompson at the evidentiary hearing (State's Brief at 40 n.3), was properly rejected by the district court. "[A]n attack on Root's competency and credibility based on post-1990 information was not and is not relevant to the Court's views regarding the credibility of the forensic evidence presented at [Thompson's] trial." Order, *Thompson v. Calderon*, Case No. CV 89-3630- RG (May 12, 1995), at 2-3. The district court also found that Dr. Root's credentials were "impressive," that he was "a pathologist for the County of San Bernardino for 28 years," and that at "the evidentiary hearing, [the State] never attempted to contest the substance of Root's testimony." Id. at 3.

evidence was prejudicial. J.A. 14-16. In agreeing with the district court that the failure to attack the rape evidence was prejudicial, the *en banc* court correctly concluded that the forensic evidence was the State's strongest evidence of the rape charge.[24] This is confirmed by the emphasis the prosecutor gave it in his closing argument to the jury.[25] The prosecutor stressed that the injuries testified to by Dr. Richards proved that Ms. Fleischli had been bound and raped before she was killed, proclaiming that a finding of consensual sex "defies all the physical evidence in the case." RT 2559-60, 2633-36. He cited Dr. Richards' testimony in urging that "bruises to other parts of the body, to the wrist, to the ankles, such as we have here are even more important [than the absence of vaginal bruising] . . . in determining what happened to the victim." RT 2633. He also argued that it was clear from Mr. Thompson's past possession of handcuffs and from Deputy Coder's testimony that the right wrist had been injured by handcuffs – evidence which the prosecutor emphasized was "uncontradicted" by Mr. Thompson's defense counsel – that Mr. Thompson, not his codefendant, was the perpetrator. RT 2634-36, 2467. Following the prosecutor's argument, the jury was instructed by the trial court

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[24] The criminal defense attorney called as an expert witness by the State at the evidentiary hearing conceded that the prosecutor was able to make "very vivid and graphic" use of the medical and forensic evidence in closing argument to present "a picture of a very, very grotesque situation to that jury" that was "devastating" to the defense. Transcript of Evidentiary Hearing, 321, 331.

[25] This Court has held that the arguments of counsel must be given due consideration in assessing prejudice. *See, e.g., Johnson v. Mississippi*, 486 U.S. 578, 586 (1988) (use of an invalid conviction in a sentencing hearing was prejudicial because "[t]he prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances 'one against the other' ").

to consider the "presence of bruising and contusions to the wrist, hands, and ankles" and a "cut on her wrist" as evidence of rape. CT 1600; RT 2671-74. In addition, the rape theory provided the only motive that Mr. Thompson had for committing the murder.

The panel disregarded the district court's findings with regard to the medical/forensic evidence, stating that counsel "missed opportunities to rebut only certain aspects of the forensic evidence" (J.A. 150), and then determined that the remainder of the evidence was sufficient to convict Mr. Thompson of rape. J.A. 145-147, 150-151. Thus, after denying due credit to the district court's fact findings, the panel used an improper analysis to determine the issue of prejudice by putting aside the evidence that should have been challenged by defense counsel and then calculating that there was "enough left to convict." *Kyles v. Whitley*, 115 S.Ct. 1555, 1586 n. 8 (1995). In doing so, the panel utilized an "outcome determinative" test rejected by this Court in *Strickland v. Washington*, 466 U.S. 668, 693 (1984). The panel's narrow focus failed to recognize that, had trial counsel competently challenged the evidence described above, the other evidence that the panel relied on, standing alone, would have had little persuasive force. The *en banc* court, on the other hand, correctly applied the prejudice prong of *Strickland* by determining that, had counsel adequately challenged the key aspects of the prosecution's case, he would have " 'put the whole case in such a different light as to undermine confidence in the verdict,' " J.A. 224, *quoting Kyles, supra*, 115 S.Ct. at 1568.

Not only was the panel's consideration of the remaining evidence to determine prejudice legally flawed, but, as the *en banc* court recognized, the panel's determination that this evidence constituted substantial evidence of rape does not withstand scrutiny. J.A. 224. The panel relied on the following evidence as "strong evidence" of rape: the existence of

semen consistent with Mr. Thompson's blood type; that Ms. Fleischli's blouse and brassiere were cut and pulled down to her elbows, supposedly placing her in a "position consistent with restraint during a rape;" that she was found with no shoes, socks or underwear; that her jeans were zipped but not buttoned at the waistband; and that she supposedly suffered a severe crushing injury to her right wrist at or near the time of death. J.A. 145-146.

Because Mr. Thompson testified that he and Fleischli had had consensual intercourse, the presence of semen proves nothing on the issue of consent.

With regard to the cut clothes, there is no evidence as to when the clothing was cut, nor any evidence of any cuts to the chest or bruises to the arms or any other evidence which would support the panel's theory that the clothing was used to restrain a struggling woman. To conclude that the cut clothes constitute evidence of rape is speculation that ignores plausible alternatives, *e.g.*, that Leitch did this to his ex-girlfriend either during the course of an assault on her or to humiliate her before killing her. As the *en banc* court held, "Viewed with the evidence that Fleischli's jeans were on, zipped, and belted, this more likely suggests that the restraint was connected to the murder than that it evidenced a rape." J.A. 224 n.6.

In addition, there is no evidence that Ms. Fleischli had been wearing socks or underwear that night. Tracy Leitch's detailed testimony at trial about Fleischli's attire on the night she died mentioned neither, but did describe sandals, usually worn without socks. RT 1556. The absence of those shoes says nothing as to whether a rape occurred.

Nor is the fact that Ms. Fleischli's jeans were fully zipped, but unbuttoned at the waistband, probative of rape, particularly given the fact that her belt was buckled. Ms. Fleischli could have failed to fasten the button because the jeans were tight, or it could have come undone during her

murder or the transport of her body. These explanations are far more logical than the State's which has Mr. Thompson cutting Ms. Fleischli's clothes, restraining her, raping and killing her, and then putting the pants back on, carefully zipping them and buckling the belt, but neglecting to fasten one button.[26]

The wrist injury would be probative of rape only if it had occurred prior to Ms. Fleischli's death, and there is no evidence that it did.

The panel focused on Mr. Thompson's testimony as the most damaging aspect of the case, equating it with a defendant's "clear, lucid and powerful" confession to three murders. J.A. 146-147, *citing Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 957 (1996). However, unlike

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[26] In addition, that the State's criminalist failed to find semen in the jeans suggested that Ms. Fleischli had douched or washed, which was consistent with consensual sexual intercourse, not with the prosecution's theory that she had been bound, raped, and then murdered. Contrary to the expert testimony presented at the evidentiary hearing and credited by the district court, *amicus curiae* Criminal Justice Legal Foundation speculates that douching by the victim is not probative of consensual sex because permitting the victim to wash after intercourse is not inconsistent with rape. Amicus Brief, at 22. Whatever applicability that suggested scenario might have to rape cases generally, it is irreconcilable with the prosecutor's rape scene in this case, in which Ms. Fleischli was bound hand and foot and handcuffed, her clothes cut and pulled back around her arms, a knife was held to her head, and Mr. Thompson then raped and killed her. *See, e.g.*, RT 2559-60, 2633-36. Evidence of douching would have undermined this theory of the case. As the district court noted, the failure of trial counsel to bring the evidence of lack of drainage to the jury's attention and to argue its significance fully demonstrated his inattention to challenging the rape charge (J.A. 16 n.12) and prevented the jury from considering the significance of this evidence.

Williams, Thompson admitted only that he had consensual intercourse with Ms. Fleischli, and denied that he had raped or killed her.[27] Although Mr. Thompson did tell the police that he did not have sexual intercourse with Ms. Fleischli on the night of her death, this was during his initial police interview. Mr. Thompson, never arrested before, had been arrested in Mexico at gunpoint, interrogated by Mexican police, put on an airplane between two Orange County sheriff deputies, and, upon his arrival in the United States, was immediately interrogated, with no attorney. His testimony that he was tired, in shock at being charged with murder, and did not know what to say is not far-fetched. RT 2340-2343. Finally, had trial counsel adequately impeached the informants and the misleading evidence regarding bruises to the deceased's body, thereby undermining the key aspects of the prosecution's rape case, Mr. Thompson's testimony that he had passed out after having consensual intercourse, and after a night of drinking and smoking hashish, would have appeared much more plausible to the jury.

3. The Panel Misapplied Constitutional Principles In Finding No Prejudice From Trial Counsel's Failure To Adequately Impeach The Informants

The district court found that trial counsel was ineffective because he failed to impeach the informants with readily

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[27] Although characterized by the panel as a "reluctant admission" (J.A. 147), it should be noted that Mr. Thompson's testimony that he had consensual sex was not dictated by the prosecution's evidence. The medical evidence did not tie Mr. Thompson directly to intercourse with the victim because the blood typing from the swab was consistent with Ms. Fleischli's blood type and that of David Leitch, as well as Mr. Thompson's.

available evidence. J.A. 17-34.[28] The panel found counsel's failure to be non-prejudicial. However, as the *en banc* court recognized, "the prosecutor himself stated in his closing argument [that] Fink and Del Frate's testimony provided the dispositive evidence that Thompson had raped Fleischli and murdered her to cover up the rape." J.A. 227. The prosecutor stated that, "their testimony is dispositive of any issues of fact left in this case." RT 2566. Calling the informant testimony "a complete admission to first degree murder and special circumstances" and "very, very damaging,", he told the jury that, "[t]hey tell you the motive and they tell you everything that happened." RT 2637. Urging the jury not to focus on the informants' character, the prosecutor stated, "[t]hat evades the issue because that's not the question. The question is are they telling you the truth about what the defendant said? Because if they are, it's through. It's all over. And there isn't a single solitary doubt about what happened." RT 2368. Given the importance that the prosecutor ascribed to the informants' testimony,[29] had trial counsel adequately impeached them, "the prosecution's rape case would have been substantially weakened." J.A. 227.

The panel based its finding that counsel's inadequate impeachment of the informants was not prejudicial on an improper legal standard. According to the panel, "[t]he record does not indicate that the jury must have believed Fink in order to convict Mr. Thompson of rape." J.A. 152-153. The panel proceeded on the mistaken belief that Mr. Thompson's burden was to show that the jury *must have believed* the informants in order to convict. The law is quite to

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[28] Remarkably, the State's brief fails to discuss this aspect of the decision below, completely ignoring the critical issue of trial counsel's failure to impeach the informants.

[29] As noted above, this Court has recognized the significance of counsel's arguments to the jury in assessing prejudice.

the contrary. Although Mr. Thompson has the burden of establishing prejudice, he need only show a reasonable probability of a different result, not that trial counsel's deficient conduct "more likely than not altered the outcome of the case." *Strickland, supra,* 466 U.S. at 693-694. Clearly, the required reasonable probability is not, as suggested by the panel, a showing that counsel's failures "must have" produced the outcome of the case, but rather only "a probability sufficient to undermine confidence in the result." *Id.*

As with its findings with regard to the forensic evidence, the panel found that counsel's failure to impeach the informants did not prejudice Mr. Thompson by considering "the other evidence of rape" (J.A. 152), and by ignoring the importance of the informant testimony to the State's case, as confirmed by the prosecutor's closing argument. The *en banc* court, applying the correct standard, found that the failure to adequately impeach the two informants "fatally undermines our confidence in the outcome of Thompson's rape conviction" (J.A. 226, *citing Kyles, supra,* 115 S.Ct. at 1555), and that counsel's "cumulative errors in failing to investigate and impeach the jailhouse informants and to rebut the forensic evidence of rape cast grave doubt on the reliability of the rape conviction and the rape special circumstance finding, and thus of the death sentence itself." J.A. 226.

C. The Panel Erroneously Found That The Prosecutor's Tactics Did Not Render The Trial Fundamentally Unfair

The panel's conclusion that a prosecutor is permitted first to present evidence and argument that one codefendant had the opportunity and sole motive to kill the victim, and then to present evidence and argument in a subsequent trial that the other codefendant had the opportunity and sole motive to commit the crime – when no circumstances

changed between the trials – constitutes a fundamental error of law.

At Mr. Thompson's trial, the prosecutor argued that Mr. Thompson alone had raped and then had killed Ms. Fleischli to cover up the rape, and that Leitch's role was limited to helping dispose of the body. At Leitch's subsequent trial, the same prosecutor, before the same judge, argued that Leitch had the sole motive and the opportunity to commit the murder, and that he was equally or more culpable than Mr. Thompson.[30] The fundamental inconsistency between the theories at the two trials is manifest from the prosecutor's very different closing arguments, quoted at length in the *en banc* court's opinion. J.A. 231-234.

At Mr. Thompson's trial, the prosecutor vigorously contested all attempts by the defense to inculpate Leitch and totally discounted the importance of the testimony of defense witnesses presented to show that Leitch, not Mr. Thompson, had the motive and violent disposition for the murder. Yet, after disparaging these witnesses at Mr. Thompson's trial, the prosecutor served them with subpoenas as they left the witness stand so that they would appear as prosecution witnesses at Leitch's trial, at which the

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[30] This is not, as suggested by the State (Brief at 46), a case in which the prosecutor consistently argued that the defendants had separate, co-existing motives for the crime. At Mr. Thompson's trial, the prosecutor stated that only Mr. Thompson had the motive: "Why did Ginger Fleischli die? Because she said she was going to tell for what he [Mr. Thompson] did to her. So he killed her. And that's the only evidence that we have before us." RT 2648. At Leitch's trial, the same prosecutor stated that only Leitch had the motive: "Who has the motive? Mr. Leitch . . . And his was the only motive or reason for her demise." Leitch RT 2563, 2513, 2570.

prosecutor stressed the importance of the very same testimony. At Leitch's trial he argued that the rape-murder theory that he had presented at Mr. Thompson's trial was ludicrous (Leitch RT 2564), that Leitch had "the only motive or reason for [Ms. Fleischli's] demise" (Leitch RT 2570), and that "all evidence we have incriminates Mr. Leitch, at best equally, and more so than Mr. Thompson." Leitch RT 2505.

The prosecutor's manipulation of the facts and witnesses, and his pursuit of factually and legally inconsistent theories, breached the ethical and professional duties imposed upon a prosecutor, "violated the fundamental fairness requirement stemming from the due process clause of the Fourteenth Amendment" (*Drake v. Kemp*, 762 F.2d 1449, 1478 (11th Cir. 1985) (*en banc*) (Clark, J., *specially concurring*), *cert. denied*, 478 U.S. 1020 (1986)), and resulted in an arbitrary and unreliable death judgment in violation of the Eighth Amendment. A prosecutor "has no obligation to win at all costs and serves no higher purpose by so attempting." *Bruno v. Rushen*, 721 F.2d 1193, 1195 (9th Cir. 1983), *cert. denied*, 469 U.S. 920 (1984). As the *en banc* court held, "[f]rom these bedrock principles, it is well established that when no new significant evidence comes to light a prosecutor cannot, in order to convict two defendants at separate trials, offer inconsistent theories and facts regarding the same crime." J.A. 236.[31]

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[31] In its brief, the State for the first time argues that Mr. Thompson's claim of prosecutorial misconduct constitutes a new rule that would not be subject to retroactive application under *Teague v. Lane*, 489 U.S. 288 (1989). State's Brief, at 44. A *Teague* defense is not jurisdictional, however, and the State's failure to raise it in the lower courts or in its petition for a writ of *mandamus*, which was construed as a petition for a writ of *certiorari*, constitutes a waiver. *See Godinez v. Moran*, 509 U.S. 389, 397 n.8 (1993).

The prosecutor's inconsistent theories are not merely "differences in emphasis," as the panel found. J.A. 158. Mr. Thompson was tried and convicted of capital murder on the theory that he raped and then killed Ms. Fleischli to prevent her from reporting the rape, while Leitch's only involvement was disposing of the body. Leitch was tried on the theory that he and Mr. Thompson jointly killed Fleischli because of Leitch's hatred of her, and that Leitch was just as likely as Mr. Thompson to have committed any rape. That is not a difference in emphasis – that is a totally different factual and legal theory of what occurred that night.

While the panel held that it was Leitch who suffered from the use of inconsistent theories, not Mr. Thompson, the *en banc* court correctly found that the panel's reasoning was flawed:

> From the beginning, the prosecutor's theory was that the murder resulted from Leitch's plot to eliminate his former girlfriend, who impeded his reunion with his ex-wife and her money, and that both Leitch and Thompson were involved in the actual killing. Only in Thompson's trial did the prosecutor change the theory and the arguments, and offer facts that directly conflicted with the underlying premise of the charges he brought. Only in Thompson's trial did the prosecutor assert that Thompson was alone in the apartment and killed Fleischli to cover up a rape. Only in Thompson's trial did the prosecutor use as witnesses Fink and Del Frate, who were known to law enforcement officers to be wholly unreliable. In Leitch's trial, the prosecutor returned to his original theory and discredited the very evidence he had previously offered in Thompson's trial. Thus, Thompson, rather than Leitch, suffered from the due process deprivation that infected the conflicting prosecutions.

J.A. 238.

Indeed, the only reason why Mr. Thompson faces execution is because he was convicted not just of murder, but also of the special circumstance that the murder occurred during his commission of rape. He could not have been found guilty of capital rape-murder if the prosecution had proceeded at Mr. Thompson's trial on the same theory that it sponsored at Leitch's – as well as at the preliminary hearing where Mr. Thompson and Leitch were joined as codefendants – that Leitch wanted Ms. Fleischli dead and that Mr. Thompson assisted him in killing her. That theory, even though it did not totally exonerate Mr. Thompson, would make him innocent of capital murder and would have resulted in his conviction of, at most, non-capital murder, the result at Leitch's trial. The panel clearly erred when it rejected Mr. Thompson's due process claim.

IV.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the decision of the *en banc* court of appeals be affirmed.

Dated: October 29, 1997

Respectfully submitted,

GREGORY A. LONG*
QUIN DENVIR
ANDREW S. LOVE

Counsel for Respondent
Thomas M. Thompson

**Counsel of Record*